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Comment on Recent Cases

Adverse Possession: Burden of Proving Assessment of Taxes.—In *People's Water Co. v. Lewis*,¹ the plaintiff's counsel in an action of ejectment against one claiming by adverse possession, in addition to showing record title in himself, assumed the burden of proving that the land had been assessed during the preceding years. The question is suggested whether he did not thus assume an unnecessary burden. Was not the adverse possessor required to prove either that he had paid all taxes assessed, or that none had been assessed?

There seem to be two distinct lines of authority upon this question in the California courts. One line, represented by the majority opinion in *Reynolds v. Willard* holds that the entire burden is on the person claiming by adverse possession.² The other line represented by *Ross v. Evans* seems just as clear to the effect that the burden of showing that the taxes were levied and assessed is upon the owner of the record title.³ The reasons supporting the second line were stated by Commissioner Hayne thus: "The burden of showing that no taxes have been assessed is not upon the claimant by possession. That is a negative which he is not required to prove. If there had been an assessment, it is for the other party to show the fact. This is the rule which convenience requires. For it is an easy matter to show that an assessment has been levied, but a difficult one to show that none have been levied for a series of years."⁴ The District Courts of Appeal, inferentially, in 1907,⁵ and directly so late as 1909,⁶ have followed Commissioner Hayne's views. On the other hand, the Supreme Court in 1905,⁷ and again in 1911,⁸ has followed *Reynolds v. Willard*, but in both cases merely by way of dictum. In 1894, the late Mr. Justice McFarland vigorously contended for the rule as stated by Commissioner Hayne, in his concurring opinion in *Baldwin v. Temple*.⁹

¹ 15 Cal. App. Dec. 243 (decided Sept. 6, 1912).

² 80 Cal. 605; 22 Pac. 262 (1889); see also *McGrath v. Wallace*, 85 Cal. 622; 24 Pac. 793 (1890); *Baldwin v. Temple*, 101 Cal. 396; 35 Pac. 1008 (1894); *Nathan v. Dierssen*, 146 Cal. 63; 79 Pac. 739 (1905); *Allen v. Allen*, 159 Cal. 197; 113 Pac. 160 (1911).

³ 65 Cal. 439; 4 Pac. 443 (1884); *Heilbron v. Ditch Co.*, 75 Cal. 123; 17 Pac. 65 (1888); *Oneto v. Restano*, 78 Cal. 374; 20 Pac. 743 (1889); *Spotswood v. Spotswood*, 4 Cal. App. 711; 89 Pac. 362 (1907); *Silva v. Hawn*, 10 Cal. App. 544; 102 Pac. 952 (1909).

⁴ *Oneto v. Restano*, 78 Cal. at p. 379.

⁵ *Spotswood v. Spotswood*, *supra*.

⁶ *Silva v. Hawn*, *supra*.

⁷ *Nathan v. Dierssen*, *supra*.

⁸ *Allen v. Allen*, *supra*.

⁹ *Baldwin v. Temple*, *supra*.

It may be worthy of mention that the case in which Commissioner Hayne enunciated the doctrine quoted was the case of an easement. The same is true of most of the cases which have followed *Oneto v. Restano*. But the Idaho Supreme Court, under a similar statute, has applied the doctrine of *Reynolds v. Willard* to easements.¹⁰

The bar may, of course, continue to avoid the difficulty by pursuing the practice adopted by counsel in the case under notice. But in view of the vigorous language of *McFarland, J.*, above referred to, it would seem desirable that the Supreme Court should finally put the matter at rest.

H. C. K.

Bankruptcy: Acts of Bankruptcy: Preference Through Legal Proceedings.—An attachment, based on a valid claim, was levied against an insolvent debtor on July 2, 1910. The attachment not having been discharged, and nothing further having been done in the attachment suit, other creditors, just before the expiration of four months after the levy, on November 2, 1910, filed a petition in involuntary bankruptcy. Held, that the failure to discharge the attachment constituted an act of bankruptcy under Sec. 3a of the Bankruptcy Act, providing that "Acts of Bankruptcy by a person shall consist of his having . . . suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."¹

The decision is a sacrifice of the letter of the act to its practical usefulness, and turns on the meaning of the words "final disposition" in the clause quoted. The opinion holds that since the expiration of the four months' period would render the attachment no longer subject to attack and dissolution by the institution of bankruptcy proceedings,² notwithstanding the recovery of judgment within that time,³ the expiration of the four months is a "final disposition" of the property as far as the creditors are concerned, and the failure to discharge the attachment is an act of bankruptcy. The case was one of first impression, although one of the Districts Courts has made a similar holding with reference to a levy under a writ of execution.⁴

Two objections to the decision are apparent. First, it violates the ordinary meaning of the statutory language. "Final disposition" would seem clearly to refer to disposition between the attaching creditor and the insolvent and does not ordinarily occur until the recovery of judgment at least. Moreover, there is no basis for the assumption that

¹⁰ *Swank v. Sweetwater Co.*, 15 Idaho 353; 97 Pac. 297 (1908)

¹ *Folger v. Putnam* (C. C. A., 9th Cir.), 194 Fed. 793 (March 18, 1912).

² Secs. 67c, 67f Bankruptcy Act.

³ *Re Blair*, 108 Fed. 529 (1901); *Metcalf v. Barker*, 187 U. S. 165 (1902).

⁴ *Re Tupper*, 163 Fed. 766 (1908).